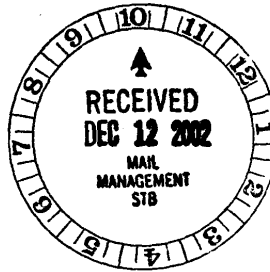


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December 11, 2002
VIA: FEDEX

Hon. Vernon A. Williams
Secretary
Surface Transportation Board
Mercury Building, #711
1925 K Street, N.W.
Washington, DC 20423-0001

ENTERED
Office of Proceedings

DEC 12 2002

Part of
Public Record

RE: STB Finance Docket No. 34255
Portland & Western Railroad, Inc.
-- Lease and Operation Exemption --
the Burlington Northern and Santa Fe Railway Company
REPLY TO MOTION TO COMPEL - 206819
AND REQUEST FOR PROTECTIVE ORDER - 206823

Dear Secretary Williams:

Enclosed please find for filing an original and ten copies of the Reply to Motion to Compel and Request for Protective Order in the above-referenced proceeding.

Also enclosed for the Board in a separate package is a copy of the lease agreement marked "Highly Confidential Materials - Subject to Request for Protective Order." This document is **not** to be placed in the public record.

Please time stamp the extra copy of this letter to indicate receipt and return it to me in the stamped, self-addressed envelope provided for your convenience.

Respectfully submitted,

Eric M. Hocky
Attorney for Portland & Western Railroad, Inc.

Enclosures

cc via FedEx: Gordon MacDougall, Esq. (W/Reply only)

BEFORE THE
SURFACE TRANSPORTATION BOARD
STB FINANCE DOCKET NO. 34255



PORTLAND & WESTERN RAILROAD, INC.
--LEASE AND OPERATION EXEMPTION--
THE BURLINGTON NORTHERN AND SANTA FE RAILWAY COMPANY

REPLY TO MOTION TO COMPEL
AND REQUEST FOR PROTECTIVE ORDER

ENTERED
Office of Proceedings

DEC 12 2002

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Public Record

ERIC M. HOCKY
GOLLATZ, GRIFFIN & EWING, P.C.
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West Chester, PA 19381-0796
(610) 692-9116

Attorneys for
Portland & Western Railroad, Inc.

Dated: December 11, 2002

BEFORE THE
SURFACE TRANSPORTATION BOARD
STB FINANCE DOCKET NO. 33734

PORTLAND & WESTERN RAILROAD, INC.
--LEASE AND OPERATION EXEMPTION--
THE BURLINGTON NORTHERN AND SANTA FE RAILWAY COMPANY



**REPLY TO MOTION TO COMPEL
AND REQUEST FOR PROTECTIVE ORDER**

Portland & Western Railroad, Inc. ("PNWR") hereby opposes the motion of United Transportation Union-General Committee of Adjustment ("UTU/GO-386") dated November 22, 2002 (and received November 25, 2002), asking the Board to compel production of the lease agreement between PNWR and The Burlington Northern Santa Fe Railway Company ("BNSF"). Because UTU/GO-386 has not met its burden to demonstrate any basis on which the document could provide relevant information, the Motion to Compel should be denied.

Background

On October 25, 2002, PNWR, a Class III carrier, posted notice to the employees of BNSF that PNWR intended to enter into a lease of the BNSF line between milepost 64.70 between Quinaby and Salem, Oregon, and milepost 141.45 near Eugene, Oregon. As required by 49 CFR §1150.42(e), the notice provided the number and types of jobs, and the applicable rates of pay, that would be offered by PNWR as a result of the transaction. Copies were filed on the national offices of the unions with employees on the lines, and a certificate was filed with the Board on October 28, 2002.

Although not required under the Board's regulations to provide a formal notice of intent (49 CFR §1150.45 only requires the service of a notice of intent if the transaction will result in the creation of a Class I or Class II carrier), PNWR provided such a notice in order to make sure that interested parties, including labor, had sufficient notice of the transaction. A copy of the notice of intent was filed with the Board on November 21, 2002.

An exemption notice complying with the Board's regulations at 49 CFR §1150 Subpart E for lease acquisitions by an existing Class III carrier, was filed with the Board on December 6, 2002. The exemption notice was filed well in advance of the seven days permitted under the regulations.

During the course of the notice period, counsel for PNWR received a request from counsel for UTU/GO-386 for a copy of the lease between PNWR and BNSF underlying this transaction, as well as other information.¹ PNWR responded by letter dated November 8, 2002, with some of the information requested, but refused to produce a copy of the confidential lease agreement. A copy of PNWR's response is attached to the UTU/GO-386 Motion to Compel as Appendix 1. In the response PNWR offered to reconsider the document request if UTU/GO-386 would identify the particular types of terms it wanted to review. PNWR did not hear further from counsel for UTU/GO-386 until it received a copy of the UTU/GO-386 Motion to Compel on November 25, 2002.²

Denial of Motion

UTU/GO-386's request to review the entire unredacted commercially sensitive lease agreement is merely a fishing expedition and has no relevance to any relief that UTU/GO-386 might seek in this proceeding. (At this point of course it has not sought any relief other than the production of the lease agreement.) Since UTU/GO-386 has not demonstrated a need for the document, such a fishing expedition should not be permitted.

As an initial matter, it is clear that discovery was not permitted until after December 6, 2002 when PNWR filed its exemption notice. Under the Board's regulations at 49

¹ PNWR has not received any inquiries from the national offices of any unions, including UTU.

² At the same time, counsel for UTU/GO-386 also served a request for copies of the incidental trackage rights agreements referred to in the notice of intent and the exemption notice. The forms of trackage rights are Exhibits to the lease agreement. Thus, any order of the Board either denying or compelling production of the lease agreement, would also apply to the trackage rights agreements.

CFR §1121.2, discovery may not begin until the filing of the [notice of exemption]³ or a petition for revocation. Since the notice of exemption was not filed until December 6, 2002, all of UTU/GO-386's discovery requests, and thus its Motion to Compel, are premature, and the Motion should be denied.

Even when discovery is permitted under the Board's regulations and procedures, discovery is only available when there has been a clear showing that the discovery is necessary, non-privileged, not otherwise available, and "relevant to the subject matter" involved. *See* 49 CFR §1114.21(a). The only "subject matter" the UTU/GO-386 Motion to Compel refers to is the purported need to understand the terms of the transaction to "fully appreciate the impact of the transaction upon employees." UTU/GO-386 Motion to Compel at 4. However, disclosure of the lease agreement is not required to evaluate the impact of the transaction on employees.

Under 49 USC §10902(d), it is clear that no labor protective conditions may be imposed on this Class III acquisition. The Board's regulations for exemption transactions under 49 USC §10902 do not require the submission of the acquisition agreement (here the lease from BNSF). Indeed, when the parallel provisions for exempt transactions under 49 USC §10901 were originally adopted by the Interstate Commerce Commission ("ICC") in 1985, the ICC specifically declined to adopt requirements that the exemption notice include more detailed financial and operating data such as would be contained in the acquisition agreement. *Class Exemption – Acq. & Oper. of R. Lines under 49 U.S.C. 10901*, 1 ICC 2d 810, 817 (1985).

However, the Board has been sensitive to the requests of labor for more information with respect to exemption proceedings. In 1997, the Board adopted the additional notice requirements found in 49 CFR §§1150.32(e) and 1150.42(e). *Acquisition of Rail Lines under 49 U.S.C. 10901 and 10902 - Advance Notice of Proposed Transactions*, STB Ex Parte No. 562 (served September 2, 1997). In adopting the regulations the Board noted: "We have

³ Since 49 CFR §1121.1 provides that the procedures in the Part apply to notices of exemption, the reference in Section 1121.2 to "petition for exemption" should be read as "notice of exemption" in this proceeding.

decided to adopt the proposal to amend our exemption procedures so as to make available more information to employees, and thus to their local communities, that may be affected by line sale transactions.” *Id.*, at 4. Further, it found: “We believe that it will be sufficient that the notice disclose, in general terms, the types and numbers of jobs expected to be available, the terms of employment and principles of selection, and the lines that are to be transferred.” *Id.*, at 6.

PNWR has complied with all of the notice requirements established by the Board under 49 CFR §1150.42(e). Additionally, PNWR has voluntarily provided the additional notice to the public and to labor by serving a notice of intent in the form that is only required of larger transactions under 49 CFR §1150.45. (A copy of the notice of intent is attached to the UTU/GO-386 Motion to Compel as Appendix 2.)

Thus, production of the lease agreement is not necessary for labor to determine the protection that will be available because 49 USC §10902 does not permit the imposition of labor protection in the case of Class III acquisitions. Further, production of the lease agreement is not necessary for labor to otherwise evaluate the impact of the transaction because the Board has already gone to great lengths to require advance notice to labor that includes information about available jobs and rates of pay, and because PNWR, in addition to providing such information, has provided a notice of intent that discloses the possible impact on employees and PNWR’s service intentions. UTU/GO-386 has not identified what types of additional information it would need from the lease agreement, nor has it demonstrated a need for *any* additional information, to evaluate the impact on employees.⁴ Accordingly, PNWR should not be required to produce a copy of the lease agreement, and the UTU/GO-386 Motion to Compel should be denied.

Alternative Request for Protective Order

If the Board were to order production of the lease agreement, PNWR requests that the production be made subject to an appropriate protective order in accordance with 49 CFR

⁴ In response to the advanced notice to labor, PNWR has not received a single application for employment from any BNSF employees.

§1114.21(c). (UTU/GO-386 concedes that if production of the lease agreement is required, it should be subject to a protective order. UTU/GO-386 Motion to Compel at 3.) Because of the sensitive nature of the commercial terms, and the confidentiality provisions of the lease agreement, the Board should treat the lease agreement as a "Highly Confidential" document and require anyone who qualifies and wants to review the agreement to sign the appropriate undertaking. Further, PNWR believes that even if a "Highly Confidential" version were ordered produced, PNWR should be permitted to redact the specific division and rate information from the version that is produced since those provisions do not affect the impact of the lease on other parties.⁵ A form of protective order, including undertakings, consistent with protective orders previously approved by the Board is attached hereto as Appendix 1.

Conclusion

For the reasons set forth above the Board should deny the motion to compel. In the alternative, the Board should enter a protective order and require interested persons to execute a highly confidential undertaking in the form attached to this Reply.

Respectfully submitted,



ERIC M. HOCKY
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(610) 692-9116

Attorneys for
Portland & Western Railroad, Inc.

Dated: December 11, 2002

⁵ In accordance with the provisions of 1104.14, PNWR is submitting the lease agreement to the Board in a separate package marked "HIGHLY CONFIDENTIAL MATERIALS SUBJECT TO REQUEST FOR A PROTECTIVE ORDER." PNWR has marked in the lease those limited portions it wishes to redact from all versions of the lease agreement.

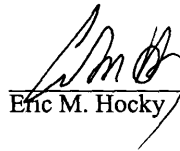
CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing notice of intent was served by FedEx

upon:

Gordon P. MacDougall, Esq.
1025 Connecticut Ave. NW
Washington, D.C. 20036

Dated: December 11, 2002


Eric M. Hocky

PROTECTIVE ORDER

1. For purposes of this Protective Order:

(a) "Confidential Documents" means documents and other tangible materials containing or reflecting Confidential Information.

(b) "Confidential Information" means traffic data (including but not limited to waybills, abstracts, study movement sheets, and any documents or computer tapes containing data derived from waybills, abstracts, study movement sheets, or other data bases, and cost work papers), the identification of shippers and receivers in conjunction with shipper-specific or other traffic data, the confidential terms of contracts with shippers, or carriers, confidential financial and cost data, divisions of rates, trackage rights compensation levels and other compensation between carriers, and other confidential or proprietary business or personal information.

(c) "Designated Material" means any documents designated or stamped as "CONFIDENTIAL" or "HIGHLY CONFIDENTIAL" in accordance with paragraph 2 or 3 of this Protective Order, and any Confidential Information contained in such materials.

(d) "Proceedings" means those before the Surface Transportation Board ("Board") concerning the transaction in Finance Docket No. 34255, and any related proceedings before the Board, and any judicial review proceedings arising from Finance Docket No. 34255 or from any related proceedings before the Board.

2. If any party to these Proceedings determines that any part of a document it submits, discovery request it propounds, or a discovery response it produces, or a transcript of a deposition or hearing in which it participates, or of a pleading or other paper to be submitted, filed or served in these Proceedings contains Confidential Information or consists of Confidential Documents, then that party may designate and stamp such Confidential Information and Confidential Documents as "CONFIDENTIAL." Any information or documents designated or stamped as "CONFIDENTIAL" shall be handled as provided for hereinafter.

3. If any party to these Proceedings determines that any part of a document it submits, discovery request it propounds, or a discovery response it produces, or a transcript of a deposition or hearing in which it participates, or of a pleading or other paper to be submitted, filed or served in these Proceedings contains shipper-specific rate or cost data, division of rates, trackage rights compensation levels, other compensation between carriers, or other competitively sensitive or proprietary information, then that party may designate and stamp such Confidential Information as "HIGHLY CONFIDENTIAL." Any information or documents so designated or stamped shall be handled as provided hereinafter.

4. Information and documents designated or stamped as "CONFIDENTIAL" may not be disclosed in any way, directly or indirectly, or to any person or entity except to an employee, counsel, consultant, or agent of a party to these Proceedings, or an employee of such counsel, consultant, or agent, who, before receiving access to such information or documents, has been given and has read a copy of this Protective Order and has agreed to be bound by its terms

by signing a confidentiality undertaking substantially in the form set forth at Exhibit A to this Order.

5. Information and documents designated or stamped as "HIGHLY CONFIDENTIAL" may not be disclosed in any way, directly or indirectly, to any employee of, or represented by, a party to these Proceedings, or to any other person or entity except to an outside counsel or outside consultant to a party to these Proceedings, or to an employee of such outside counsel or outside consultant, who, before receiving access to such information or documents, has been given and has read a copy of this Protective Order and has agreed to be bound by its terms by signing a confidentiality undertaking substantially in the form set forth at Exhibit B to this order.

6. Any party to these Proceedings may challenge the designation by any other party of information or documents as "CONFIDENTIAL" or as "HIGHLY CONFIDENTIAL" by filing a motion with the Board or with an administrative law judge or other officer to whom authority has been lawfully delegated by the Board to adjudicate such challenges.

7. Designated material may not be used for any purposes, including without limitation any business, commercial or competitive purposes, other than the preparation and presentation of evidence and argument in Finance Docket No. 34255, any related proceedings before the Surface Transportation Board, and/or any judicial review proceedings in connection with Finance Docket No. 34255 and/or with any related proceedings.

8. Any party who receives Designated Material in discovery shall destroy such materials and any notes or documents reflecting such materials (other than file copies of pleadings or other documents filed with the Board and retained by outside counsel for a party to these Proceedings) at the earlier of: (1) such time as the party receiving the materials withdraws from these Proceedings, or (2) the completion of these Proceedings, including any petitions for reconsideration, appeals, or remands.

9. No party may include Designated Material in any pleading, brief, discovery request or response, or other document submitted to the Board, unless the pleading or other document is submitted under seal, in a package clearly marked on the outside as "Confidential Materials Subject to Protective Order." See 49 CFR 1104.14. All pleadings and other documents so submitted shall be kept confidential by the Board and shall not be placed in the public docket in these Proceedings except by order of the Board or of an administrative law judge or other officer in the exercise of authority lawfully delegated by the Board.

10. No party may include Designated Material in any pleading, brief, discovery request or response, or other document submitted to any forum other than this Board in these Proceedings unless (1) the pleading or other document is submitted under seal in accordance with a protective order that requires the pleading or other document to be kept confidential by that tribunal and not be placed in the public docket in the proceeding, or (2) the pleading or other document is submitted in a sealed package clearly marked, "Confidential Materials Subject to Request for Protective Order," and is accompanied by a motion to that tribunal requesting issuance of a protective order that would require the pleading or other document be kept confidential and not be placed in the public docket in the proceeding, and requesting that if the motion for protective order is not issued by that tribunal, the pleading or other document be returned to the filing party.

11. No party may present or otherwise use any Designated Material at a Board hearing in these Proceedings, unless that party has previously submitted, under seal, all proposed exhibits and

other documents containing or reflecting such Designated Material to the Board, to an administrative law judge or to another officer to whom relevant authority has been lawfully delegated by the Board, and has accompanied such submission with a written request that the Board, administrative law judge or other officer (a) restrict attendance at the hearing during any discussion of such Designated Material, and (b) restrict access to any portion of the record or briefs reflecting discussion of such Designated Material in accordance with this Protective Order.

12. If any party intends to use any Designated Material in the course of any deposition in these Proceedings, that party shall so advise counsel for the party producing the Designated Material, counsel for the deponent, and all other counsel attending the deposition. Attendance at any portion of the deposition at which any Designated material is used or discussed shall be restricted to persons who may review that material under the terms of this Protective Order. All portions of deposition transcripts or exhibits that consist of, refer to, or otherwise disclose Designated Material shall be filed under seal and be otherwise handled as provided in paragraph 9 of this Protective Order.

13. To the extent that materials reflecting Confidential Information are produced by a party in these Proceedings, and are held and/or used by the receiving person in compliance with paragraphs 1, 2 or 3 above, such production, disclosure, holding, and use of the materials and of the data that the materials contain are deemed essential for the disposition of this and any related proceedings and will not be deemed a violation of 49 U.S.C. 11904 or of any other relevant provision of the ICC Termination Act of 1995.

14. All parties must comply with all of the provisions of this Protective Order unless the Board or an administrative law judge or other officer exercising authority lawfully delegated by the Board determines that good cause has been shown warranting suspension of any of the provisions herein.

15. Nothing in this Protective Order restricts the right of any party to disclose voluntarily any Confidential Information originated by that party, or to disclose voluntarily any Confidential Documents originated by that party, if such Confidential Information or Confidential Documents do not contain or reflect any Confidential Information originated by any other party.

Exhibit A

UNDERTAKING -- CONFIDENTIAL MATERIAL

I, _____, have read the Protective Order served _____, 2002, governing the production and use of Confidential Information and Confidential Documents in STB Finance Docket No. 34255, understand the same, and agree to be bound by its terms. I agree not to use or permit the use of any Confidential Information or Confidential Documents obtained pursuant to that Protective Order, or to use or to permit the use of any methodologies or techniques disclosed or information learned as a result of receiving such data or information, for any purpose other than the preparation and presentation of evidence and argument in Finance Docket No. 34255, any related proceedings before the Surface Transportation Board, and/or any judicial review proceedings in connection with Finance Docket No. 34255 and/or with any related proceedings. I further agree not to disclose any Confidential Information, Confidential Documents, methodologies, techniques, or data obtained pursuant to the Protective Order except to persons who are also bound by the terms of the Order and who have executed Undertakings in the form hereof, and that at the conclusion of this proceeding (including any proceeding on administrative review, judicial review, or remand), I will promptly destroy any documents containing or reflecting materials designated or stamped as "CONFIDENTIAL," other than file copies, kept by outside counsel, of pleadings and other documents filed with the Board.

I understand and agree that money damages would not be a sufficient remedy for breach of this Undertaking and that Applicants or other parties producing confidential information or confidential documents shall be entitled to specific performance and injunctive and/or other equitable relief as a remedy for any such breach, and I further agree to waive any requirement for the securing or posting of any bond in connection with such remedy. Such remedy shall not be deemed to be the exclusive remedy for breach of this Undertaking but shall be in addition to all remedies available at law or equity.

Dated: _____

Exhibit B

UNDERTAKING -- HIGHLY CONFIDENTIAL MATERIAL

I, _____, am outside [counsel] [consultant] for _____, for whom I am acting in this proceeding. I have read the Protective Order served on _____, 2002, governing the production and use of Confidential Information and Confidential Documents in STB Finance Docket No. 34255, understand the same, and agree to be bound by its terms. I agree not to use or to permit the use of any Confidential Information or Confidential Documents obtained pursuant to that Protective Order, or to use or to permit the use of any methodologies or techniques disclosed or information learned as a result of receiving such data or information, for any purpose other than the preparation and presentation of evidence and argument in Finance Docket No. 34255, any related proceedings before the Surface Transportation Board, or any judicial review proceedings in connection with Finance Docket No. 34255 and/or with any related proceedings. I further agree not to disclose any Confidential Information, Confidential Documents, methodologies, techniques, or data obtained pursuant to the Protective Order except to persons who are also bound by the terms of the Order and who have executed Highly Confidential undertakings in the form hereof.

I also understand and agree, as a condition precedent to my receiving, reviewing, or using copies of any information or documents designated or stamped as "HIGHLY CONFIDENTIAL," that I will take all necessary steps to assure that said information or documents be kept on a confidential basis by any outside counsel or outside consultants working with me; that under no circumstances will I permit access to said materials or information by employees of, or represented by, my client or its subsidiaries, affiliates, or owners, and that at the conclusion of this proceeding (including any proceeding on administrative review, judicial review, or remand); that I will promptly destroy any documents containing or reflecting information or documents designated or stamped as "HIGHLY CONFIDENTIAL," other than file copies, kept by outside counsel, of pleadings and other documents filed with the Board.

I understand and agree that money damages would not be a sufficient remedy for breach of this undertaking and that Applicants or other parties producing confidential information or confidential documents shall be entitled to specific performance and injunctive and/or other equitable relief as a remedy for any such breach, and I further agree to waive any requirement for the securing or posting of any bond in connection with such remedy. Such remedy shall not be deemed to be the exclusive remedy for breach of this Undertaking but shall be in addition to all remedies available at law or equity.

Dated: _____

OUTSIDE [COUNSEL] [CONSULTANT]